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The judgment recently rendered against the United States by Judge Ross of the United States Circuit Court of California, in the suit brought by it against the estate of the late Senator Stanford to recover a large sum of money as his personal indebtedness to the government for his share of the bonds and interest of the Central Pacific Railroad which had never been paid, though doubtless justified by the logic of law, has been violently assailed by the people of California. Judge Ross held that the issue in the case was dependent, not upon what the laws of California may or may not have provided in respect to the liabilities of stockholders of corporations organized under those laws, but upon the contract made between the United States and the railroad companies, in which defendant's testator was a stockholder. The grants contained in the Pacific railroad acts, and constituting the contract which was the basis of the suit, were, Judge Ross said, *sui generis*, and have been so characterized by the Supreme Court of the United States, and the whole scope and tenor of the legislation, constituting the contract under which the line of railroad and telegraph was constructed, in consideration of which the bonds in question were issued and loaned to the Central Pacific Railroad Company of California and the Western Pacific Railroad Company, respectively, unmistakably showed that no personal liability of the individual stockholders was contemplated, either by the United States on the one side, or the railroad companies and their stockholders on the other side. The Attorney-General has directed that an appeal be taken from the decision.

The decision of the second division of the Supreme Court of Missouri, in Millar v. Madison Car Co., 31 S. W. Rep. 574, is likely to prove, if it remains undisturbed, a very embarrassing precedent, in the law of appellate procedure, in Missouri. It would seem to have the effect of authorizing the appellate court in certain cases to try and determine the cause upon the conception of the case, formed and expressed by the trial judge, in the court below, rather than upon the record. That case was a suit for personal injuries. Upon the trial the jury found a verdict for the defendant. A new trial was granted plaintiff on the ground of error in instructing the jury. The order of the lower court, granting the new trial, states that the motion therefor is "sustained for the reason that there was error, prejudicial to the plaintiff, in giving instructions Nos. 5 and 6, in the form in which they were asked and given,—these should have been modified or not given at all,—and for the reason that instruction No. 9 should not have been given." On appeal from this order setting aside the verdict and granting the new trial, the second division of the Supreme Court (Gantt, P. J.) found that there was no error in the instructions mentioned and that, therefore, the trial court erred in granting a new trial on that ground, and that, since the court had specified the grounds of its ruling, the Appellate Court would look no further to see whether the new trial was not in fact properly granted, because of other errors, than those specified in the order, but, as to everything beyond the specific grounds set forth, would "proceed upon the salutary presumption indulged in favor of the correctness of the rulings of the Circuit Court; that, as the trial court had under consideration ten different grounds for a new trial and adjudged, in effect, that none of these were sufficient save those which it sustained, and which, as required by statute, it entered upon the record, the Appellate Court, indulging the presumption, must hold that there is, *prima facie*, no ground for disturbing the verdict of the jury except those specified in the order granting the new trial, and that, as to the other grounds, the burden is shifted to the respondent, to show that the ruling of the trial court, in granting the new trial, was right.

The divisional court, it seems to us, reaches this extraordinary result: that a case, in an Appellate Court is to be tried, not upon the record itself made by both parties and the lower court, but upon the statement of the judge of the lower court, of his impression of the merits of the controversy between the parties, set out as the grounds

of his ruling on the motion for a new trial. If this ruling becomes established as a precedent, appeals from orders granting new trials will hinge largely upon the individuality of the trial judge. The rule of equity, and of law, too, will indeed be the length of the chancellor's foot.

The court reaches this extraordinary result by putting a literal interpretation upon the language of a statute, while ignoring its history and the manifest purpose of its enactment. Plainly, if there were no statute requiring the court to specify the grounds of its ruling in the order granting a new trial, a voluntary statement of such grounds would not limit the inquiry to their validity. Such a statement by the judge could not become a substitute for the record. And it is equally plain that the statute, under which the trial judge is required to state the ground of his ruling in the order granting a new trial, was not intended to change the rule that a case in the Appellate Court is to be tried upon the whole record and that the burden of showing error is upon the appellant. That statute, (Rev. St. Mo. 1889, Sec. 2241) provides that "only one new trial shall be allowed to either party, except, first, where the triers of fact shall have erred in a matter of law; second, when the jury shall be guilty of misbehavior; and every order allowing a new trial shall specify, of record, the ground or grounds on which said new trial is granted."

Plainly the purpose of the provision of this statute that the order shall specify the grounds of the new trial is chiefly to enable the trial court to know, on future motions for new trial, upon what ground the first new trial had been granted, so that the statute might be enforced. At the time of the enactment of that statute (Laws Mo. 1887, p. 230) the provision allowing appeals from orders granting motions for new trial did not exist. That came later in the amendment of Sec. 2246. It could hardly, then, have been the intention of the legislature that the trial court should, by that means, make a record, which alone could be considered by the Appellate Court in reviewing its action. This view coincides with the interpretation put by the California Supreme Court upon a similar statute. In Coghill v. Marks, 29 Cal. 673, which was an appeal from an order granting a new trial, the court said: "If there was nothing in the record upon which the order could be maintained except the mistaken ground upon which the trial court put it, we could not do otherwise than reverse the order and affirm the judgment. But there are other grounds. The objection urged by the appellant that the order granting a new trial must stand, if at all, upon the ground on which the court below put it, is not well taken. A rule of that kind would be both anomalous and improvident. Anomalous for it would put us upon reviewing judicial arguments rather than judicial action; and improvident, inasmuch as rights would not unfrequently be lost for no better reason than that they had been adjudged to be such on wrong grounds."

To the same effect are Grant v. Moore, 29 Cal. 644, and Thompson v. Felton, 54 Cal. 547.

It is to be earnestly hoped that Millar v. Madison Car Co. may be modified. In any event it ought to go to the court *in banc;* for if this ruling is to stand at all, it will be well for it to be backed by the acquiescence of the entire court, and, so acquire, if possible, some stability, if only for the sake of greater certainty in the law.

NOTES OF RECENT DECISIONS.

MECHANICS' LIEN—FIXTURES—MINING MACHINERY OWNED BY LICENSEE.—In Springfield Foundry & Machine Co. v. Cole, 31 S. W. Rep. 922, decided by the Supreme Court of Missouri, it was held that mining machinery, placed in a building erected on land by persons working the land under a miner's license, does not become part of the land, so that a mechanic's lien can attach to it. The court said in part:

In this case the miner simply had a privilege or license to mine (not by deed or grant) so long as he complied with the printed rules. The nature and character of this right is essential to a correct understanding of the respective rights of these parties when we come to consider the right to enforce a mechanic's lien upon the mining machinery used by Cole or the Davie Mining Company. That the owner of the land acquired no title or right to the mining machinery merely because it is placed upon and used in mining his realty is too plain for discussion, and no such claim is asserted here. It is not a "fixture" within the definition of that word as now understood. The relation of the owner of the mining machinery to the owner of the real estate fixes its *status*. It comes clearly within the principle of a trade or manufactur-

ing fixture, and the owner of the land acquires no title thereto. Richardson v. Koch, 81 Mo. 264. It was plainly not affixed to the land for the better enjoyment of the land itself, but it was put there for the exclusive purpose of carrying on the mining operations. Conrad v. Mining Co., 54 Mich. 249, 20 N. W. Rep. 39; Cooper v. Johnson, 143 Mass. 108, 9 N. E. Rep. 33. "The machinery, then, being a mere manufacturing fixture, removable at the pleasure of the Davie Mining Company or Cole, did it, by being placed in the building erected there, become a part of the land, so that a mechanic's lien could attach to it? A satisfactory answer solves this case. The St. Louis Court of Appeals, in Buchanan v. Cole, 57 Mo. App. 11, held that it would treat the Davie Mining Company's right as a leasehold, and the machinery as so put in the building as to become an integral part of it and a part of the realty, and sustained the lien. With all due respect to that court, we are constrained to hold otherwise. We regard the decision in Richardson v. Koch, 81 Mo. 264, as holding a contrary view, and one more in harmony with the spirit of our statute. As said in that case: "To give a lien on the engine, boiler, etc., in this case, they must have been used in the erection of the building or improvement, or afterwards connected therewith, so as to become a part of the building as a constituent part thereof. The building in this case was quite complete as a building without the engine, etc. The machinery in no manner entered into its construction. It was placed in the building after its completion. The building was more essential to the machinery than the machinery to the building. The latter served to house the former. The machinery could be taken away without the building, leaving it a complete structure or erection. It was in fact the machinery—the really valuable part or property—the alleged lienors were after"—all of which applies to the facts of this case. It would be a perversion to speak of the machinery upon which the lien is sought in this case as a part of the building. It would be to make the greater an appendage of the smaller. The house was a mere rude, rough covering for the machinery, and the machinery in no sense entered into the erection of or became a part of the house. The mere fact that the line shaft was hung to the building is not important. It is the permanent and habitual annexation, and not the manner of fastening, that determines when personal property becomes a part of the realty, and much depends upon the relation of the parties affixing the fixture. When the absolute owner of land, for the better use of his land, erects upon or attaches to the freehold certain machinery in making coal and in mines, it will go to his heirs, or will pass by deed to his grantee, and the same general rule applies between mortgagor and mortgagee; but as between landlord and tenant and the creditors of the tenant, this rule is relaxed with a view to the encouragement of mechanical and agricultural pursuits. Thomas v. Davis, 76 Mo. 75; Brown v. Baldwin, 121 Mo. 126, 25 S. W. Rep. 863. In Graves v. Pierce, 53 Mo. 423, it was held that a carding machine fixed in the building was not subject to the lien, Judge Vories saying: "The statute provides that the machinery for which the lien may be created must be furnished for a building or improvement on the land. This clearly indicates that the machinery must be such as is used in the erection of a building, and which will, when placed in the building, erection or improvement on the land, become a fixture, and become a part of the realty, or at least such as is necessary in the erection of the improvement to be made. The carding machines, etc., are not such machinery as is used in the erection of buildings or improvements on land, and the mere fact that they were placed in a house belonging to defendant cannot give plaintiff any right to a lien on the house." Inasmuch, then, as the defendants Cole and the Davie Mining Company had no interest or estate whatever in the land, but a mere mining license, and the building was not placed on the land as a betterment, but solely for mining lead and zinc, this building, so placed thereon by them by the consent of the owner, became no part of the realty, and no improvement thereon; and inasmuch as the machinery placed in said building was not placed therein in the erection of said building or as an improvement thereto, but was placed there solely for mining the lead and zinc in said land, it formed no part of said building, but remained personalty, and plaintiff was not entitled to a mechanic's lien thereon.

NEGLIGENCE — DANGEROUS PREMISES—LIABILITY OF OWNER.—In Richards v. Connell, 63 N. W. Rep. 915, it was held by the Supreme Court of Nebraska that the owner of a vacant lot, upon which is situated a pond of water or dangerous excavation, is not required to fence it or otherwise insure the safety of strangers, old or young, who may resort to said premises, not by invitation, express or implied, but for the purpose of amusement or from motives of curiosity. The court said in part:

The single question presented by the record is whether the owner of a vacant lot, upon which is situated a pond of water or a dangerous excavation, is required to fence it, or otherwise insure the safety of strangers, old or young, who may go upon said premises, not by his invitation, express or implied, but for the purpose of amusement, or from motives of curiosity. The authorities we find to be in substantial accord, and sustain the proposition that, independent of statute, no such liability exists. In Hargreaves v. Deacon, 25 Mich. 1, which was an action for the death of the plaintiff's son, a child of tender years, by drowning in a cistern left unguarded, it is said: "Cases are quite numerous in which the same questions have arisen, but we have found none which hold that an accident from negligence on private premises can be made the ground of damages, unless the party injured has been induced to come there by personal invitation or by employment which brings him there, or by resorting there as to a place of business or of general resort, held out as open to customers or others whose lawful occasions may lead them to visit there. We find no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or other relations with the occupant." In Klix v. Nieman, 68 Wis. 271, 32 N. W. Rep. 223, a case quite similar to that before us, it is said, after an exhaustive review of the authorities: "Upon the facts, we do not think the law imposes the duty upon the defendant of building a fence or guard to prevent children from reaching the pond. He is therefore not liable for the death of the child." In Ratte v. Dawson (Minn.), 52 N. W. Rep. 965, an infant three years of age was by an elder sister taken for recreation to a vacant lot, and accidentally killed by the

caving in of an embankment caused by excavation for sand, which had been left unfenced. In the opinion of the court it said: "The parties were clearly trespassers. They were not on the premises by plaintiff's invitation, or for any lawful purpose. He owed them no duty to fence or guard his premises to prevent them from entering and exposing themselves to danger." In Clark v. Manchester, 62 N. H. 578, it is said: "The plaintiff's intestate was not upon the land of the defendant where he was drowned, by express or implied invitation, for any purpose. The fact that the ground was uninclosed, and that the deceased and people at their pleasure went there without objection, was not an invitation, and from that fact alone no license can be inferred. The fact that the person who suffered injury and death was an infant child, does not change the question, nor create a liability against the defendants where none would have existed in case of injury to an adult person under similar circumstances." And to the same effect see Overholt v. Vieths, 93 Mo. 422, 6 S. W. Rep. 74; Gillespie v. McGowan, 100 Pa. St. 144; Pierce v. Whitcomb, 48 Vt. 127; McEachern v. Railroad Co., 150 Mass. 515, 23 N. E. Rep. 231; Gay v. Railroad Co., 159 Mass. 283, 34 N. E. Rep. 186; Beck v. Carter, 68 N. Y. 283; Cooley, Torts, 606; Shear. & R. Neg., sec. 505. This class of cases rests upon an entirely different principle from those cases in which the injury resulted from a lawful and proper use of the street or sidewalk adjacent to a dangerous excavation. In the latter cases the law imposes upon the owner or occupant the duty to protect the traveling public, and he will be liable for the consequences of a failure to discharge that duty; while in the former he owes no duty to the general public in that respect. We are referred to a number of cases which counsel argue sustain the plaintiff's right to recover on the facts alleged, and which may be classified as follows: (1) Cases in which the owner of land has made or permitted a dangerous excavation, embankment, or the like, so near a public highway as to injure one in the rightful use thereof. The principle which underlies this class of cases is, as we have seen, that the owner of land is required to so use it as to not imperil the life or property of another, and they are therefore not authority in case at bar. (2) Cases in which the defendant had negligently left exposed dangerous machinery likely to attract children, and resulting in their injury. Illustrative of this class, which constitute a recognized exception to the rule, are the so-called "turntable cases." (3) Cases where the plaintiff was injured while upon the defendant's premises by invitation of the latter, and where the negligence consists in a failure to keep such premises in a reasonably safe condition. But in no case cited has a recovery been allowed on a state of facts substantially like those alleged in the petition under consideration.

FOREIGN CORPORATIONS—CONFLICT OF LAWS — VALIDITY OF CONTRACT.—Within recent years many of the States have enacted statutes, regulating foreign corporations seeking to do business within their borders, and cases construing such statutes are therefore of especial value. Such a case is Hart v. Livermore Foundry & Mach. Co., 17 South. Rep. 769, decided by the Supreme Court of Mississippi, where, among other points, it is held that where the statute forbids foreign corporations from doing business in the State without compliance with its provisions, but does not declare expressly that a contract made with a delinquent corporation shall be void, nor denounce as invalid any securities given by or to it under such contracts, a *bona fide* holder of such securities, who took the same before maturity, will be protected, and that a foreign corporation in Tennessee, dealing with citizens of other States in reference to property not situated in Tennessee, is not engaged in business in such State, within the meaning of its statute, forbidding a foreign corporation to do business in Tennessee without complying with certain provisions, even though the parties meet in that State, and there draw the contract relative to such business. Upon these questions Cooper, C. J., says:

This brings us to the concluding questions involved in the cause, which are whether the acceptances and notes held by the Chemical National Bank of Chicago, and sued on in its suit by attachment in chancery, and those held by the First National Bank of Memphis, are valid as against Hart. As to those held by the Chemical National Bank, it appears that some are the notes given by Hart to the Cairo Lumber Company in the transaction relative to the purchase for him by it of the timber rights from the Everman Company, some are accommodation paper accepted by Hart for the Cairo Company, and the history of others may not be known. The bank recognized the paper for value, without notice of any defect of consideration or otherwise, and before maturity. Under these circumstances, we are of opinion that the paper is obligatory on Hart for several reasons: First. The statute, while forbidding foreign corporations from doing business in the State without compliance with its conditions, does not declare by express terms that any contracts made with delinquent corporations shall be void, nor does it denounce as invalid any securities given by it or to it under such contracts. The English, and some of the American, statutes against usury and gaming declared that all assurances and securities given in consideration thereof should be void. Under such declarations it has very generally been held that negotiable paper, even in the hands of a *bona fide* holder, is void, because of the language of the law. But where only the contract is declared void, and there is no declaration of nullity against securities, it is held that while, as between the parties and those taking with notice or after maturity, no recovery can be had, a *bona fide* holder will be protected. Chit. Bills, 81-95; Byles, Bills, 145; Daniel, Neg. Inst. § 198; Rand. Com. Paper, 532. Second. The statute of Tennessee has relation, we think, only to foreign corporations doing business in that State as domestic corporations would do who had a fixed and definite business with the people, or in relation to property therein situated. The public policy of the State, in maintenance of which the act was passed, was to compel foreign corporations desirous of engaging in business in that State as domestic corporations were engaged to supply to the public full information touching its corporate organization,

capital, and powers, to the end that those dealing with them might be protected against improvident contracts. A corporation engaged in dealing with citizens of other States in reference to property situated elsewhere than in the State of Tennessee, and as to which persons and property that State has no concern, cannot be said to be engaged in business in the State of Tennessee, within the meaning and purpose of its statute, even though the parties meet in that State, and there agree upon the terms of the contract relative to such business. This we understand to be the construction of its statute by the Supreme Court of that State in its most recent decisions. Bank v. Duncan, opinion by Chancellor Snodgrass (with which we have been favored by counsel), affirmed by Supreme Court; Milling Co. v. Gerten, 93 Tenn. 590, 27 S. W. Rep. 971. See, also, Beard v. Publishing Co., 71 Ala. 60; Collier v. Davis, 94 Ala. 456, 10 South. Rep. 86; Insurance Co. v. Sawyer, 44 Wis, 387; *In re* Alabama & C. R. R. Co., 9 Blatchf. 390, Fed. Cas. No. 124, and other cases cited by counsel for appellant, the Chemical National Bank. We are therefore of opinion that the claims sued on by the Chemical Bank in its attachment in chancery are valid against Hart. For the same reasons, and because also Hart is bound not as maker, but as indorser, on the bills held by the First National Bank of Memphis, the same are binding on him. If these bills had been nullities in their inception, he would nevertheless have been bound by his indorsement, which created a new and independent contract between him and the bank. Daniel, Neg. Inst. § 673.

TAXATION OF BANKS—EXEMPTIONS—VESTED RIGHTS—INCREASE OF CAPITAL.—The case of State v. Bank of Commerce, 31 S. W. Rep. 993, gave the Supreme Court of Tennessee considerable trouble, if we are to judge by the dissenting opinions on many of the important points involved in the decision. The court held that shares of stock and capital stock are separate and distinct property interests, and therefore the taxation of both is not double taxation, and that when exemption from taxation is claimed it must be justified by the clearest grant of organic or statute law, and the benefit of doubt must be given to the State. It appeared in this case that a bank's charter, granted under the constitution of 1834, provided that "the said institution shall have a lien on the stock for debts due it by the stockholders, before and in preference to other creditors, except the State for taxes, and shall pay to the State an annual tax of one-half of one per cent. on each share of capital stock, which shall be in lieu of all other taxes. It was held that said tax was laid on the capital stock, and that the shares of stock were subject to general taxation. Upon this point, however, Snodgrass, C. J., and McAllister, J., dissented. The court also held that where the charter of a bank did not limit the amount of capital stock, and provided for its increase, at the option of depositors, by converting their deposits into stock, such right to increase was a vested right, and the capital stock so increased is liable only to the tax provided by the charter, and the bank's right to pay only that tax was not affected by the subsequent adoption of the constitution of 1870, providing, in article 11, § 8, that the general assembly shall provide by general laws for the organization of all corporations thereafter created, which laws may at any time be altered or repealed, but that no such alteration or repeal shall interfere with vested rights. Upon this point Caldwell and Wilkes, JJ., dissented.

SALE OF REAL ESTATE — EQUITIES OF HOLDER OF OPTION UPON DESTRUCTION OF PREMISES.

I. DOCTRINE OF EQUITABLE CONVERSION.

In the sale of real estate, the giving of an option to the vendee to perfect the purchase and take the property within a specified time, is a convenient and common mode of dealing that has long been in vogue. In such a case, the holder of the option, of course, takes no title by virtue of his privilege; but upon exercising his option and electing to take the premises, he has a contract which a court of equity will specifically enforce against the vendor. When the subject-matter of the contract is improved property, it sometimes happens that a loss by fire occurs pending the option. Then difficult questions arise as to the respective rights of the parties. When an offer to sell has become a perfected contract by acceptance, and is yet unexecuted, the relationship of the parties is the reciprocal relation of trustee and *cestui que trust;* by the doctrine of equitable conversion, the vendor is constituted a trustee, holding the legal title in trust for the vendee, and the vendee, on his part, a trustee of the purchase money for the vendor.[1] And where the contract of sale involves the further element of an option to be exercised by the purchaser, while, of course, it cannot be determined whether or not a conversion is effected at all, until the purchaser exercises his option, yet the mo-

[1] Pomeroy Eq. Jur. § 1161.

ment he does exercise it, the conversion, as between the parties claiming title under the vendor, relates back to the time of the execution of the contract.[2] Whether the rule will apply to contests arising between vendor and vendee, and persons claiming under them respectively is another and more difficult question, the determination of which becomes of great practical importance where a fire loss, which intervenes between the inception of the contract and its completion by the exercise of the option, is covered by insurance, and the proceeds of the policy is claimed in equity by both vendor and vendee or their representatives. The earliest and for a long time the leading case, presenting such an application of the doctrine of equitable conversion, was Lawes v. Bennett.[3] In that case there was a lease by the testator, dated October 2, 1758, for seven years with an option in the lessee, to purchase at a certain price. In June, 1763, the testator died, devising in general language his realty to one person, and his personalty in equal shares to that person and his sister. On February 2, 1765, the tenant exercised his option and called on the devisee to convey the premises which was accordingly done. The sister thereupon brought a bill for a moiety of the purchase money received therefor, as being a part of the personalty of testator's estate. The court, Kenyon, M. R., held that she was entitled to recover with interest from the date the money came into the hands of the devisee; "when the party who has the power of making the election has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal at a future period."

This case was cited and approved by Lord Elden, in the very similar case of Daniels v. Davison,[4] and in Townley v. Bedwell.[5] It was also followed, though doubted, in Collingwood v. Row.[6]

[2] Lawes v. Bennett, 1 Cox, 167; Townley v. Bedwell, 14 Ves. 591; Collingwood v. Row, 3 Jur. N. S. 785; Goold v. Teague, 5 Jur. N. S. 1116; Weeding v. Weeding, 1 J. & H. 424; Woods v. Hyde, 31 L. J. Ch. 295; *Ex parte* Hardy, 30 Beav. 203; Drant v. Vause, 1 Y. & C. Ch. 580; Enniss v. Smith, 2 De G. & Sm. 722; D'Arras v. Keyser, 26 Pa. St. 249; Kerr v. Day, 14 Pa. St. 112.

[3] 1 Cox Ch. 167.

[4] 16 Ves. Jr. 248; 17 Ves. Jr. 433.

[5] 14 Ves. Jr. 591.

[6] 3 Jur. N. S. 785.

In Ripley v. Waterman,[7] a more recent case, the facts were peculiar. A deed was executed by three tenants in common, who were partners in trade, conveying certain premises used for their business, to trustees for such uses as they themselves should appoint; in default of appointment it was provided that the trustees should, upon the death of the shortest liver of the three, or upon the dissolution of the partnership, sell the whole property, and, after payment of debts, distribute the residue in proportion to their respective interests; and, further, that upon the death of the shortest liver, the two survivors, or either of them, should have a right to purchase his interest at a fixed valuation. After the death of one of the three, his interest was accordingly purchased by one of the others. In a contest between the personal representative and the heir-at-law over the proceeds of this sale, it was held to be personal estate at the time of the testator's death. Lord Eldon cites Lawes v. Bennett,[8] and, quoting from Kenyon, M. R., he puts the following case: "A man having a timber estate agreed to sell a given quantity per annum, to be chosen by the vendee. The owner died; a vast deal of timber was cut after his death, and that timber, though in the option of the buyer, was held to be the personal estate of the party to the contract. That is a very strong case."

The effect of these cases would seem to be that, when the option is once exercised, the equitable conversion comes into effect, relating back to the date of the contract, and constituting the vendor from that date trustee of the realty for the vendee, and the vendee trustee of the purchase money (personalty) for the vendor. It would follow, of necessity, that if a portion of the realty was destroyed by fire, pending the option, and the vendor received the insurance money thereon, he must be taken to have received it as trustee for the purchaser, in whom was the equitable title to the realty. The later cases, however, have not followed the doctrine to this conclusion, but have limited the application of the principle to contests between the personal representative and the heir, or devisee of the vendor or lessor, and do not apply between the vendor and purchaser themselves.[9] Thus,

[7] (1802) 7 Ves. Jr. 425.

[8] 1 Cox, 167.

[9] Pomeroy Eq. Jur. § 1163, citing Edwards v. West, L. R. 7 Ch. Div. 858.

in Edwards v. West[10] (1878), it appeared that, under the terms of a lease, the landlord had covenanted to insure, and the tenant had the option to purchase for a fixed sum. Before the option expired the buildings were burned and the landlord received the insurance money. The tenant then exercised his option to purchase and claimed the insurance money as part of his purchase. The court, Fry, J., held that his claim had no validity, saying: "The conversion of property, which means the treating it as belonging to somebody else before it has actually been transferred to that other person, results from a contract which can be specifically enforced; so that where there is no specific performance of contract possible, there is no conversion. It flows, in effect, from that principle of equity which considers that done which ought to be done, and which the court can compel to be done, and it extends so far back as those circumstances exist and no further. In other words, where there is a contract capable of being specifically enforced, as from the date of that contract, and neither earlier nor later, the property comprised in the contract is deemed to belong to the purchaser, and the money to be paid is believed to belong to the vendor, because those two things ought to be done, but here is no obligation to do them at any earlier date than that of the contract constituted by the exercise of the option. The conversion cannot, according to the principle, relate back to an earlier date than the contract which gives rise to it."

In support of this view, he cites Haynes v. Haynes[11] as authority for the proposition: "The only reason why a contract by the owner of land for the sale of it to another operates to effect conversion, is that a court of equity will compel him to specifically perform his contract." * * * "Conversion, as arising from a contract to sell, is merely and exclusively the consequence of the application by a court of equity of the doctrine of specific performance. Where there can be no specific performance there can be no conversion." Fry, J., then proceeds to distinguish Lawes v. Bennett,[12] as follows: "Now, whether Lawes v. Bennett is or is not consistent with the general principle upon which conversion has been held to exist, it is not for me to say. It is enough for me to say that the case has been followed in numerous other cases, though it has been observed upon by more than one judge as somewhat difficult of explanation. * * * The principle, whatever it be, has never been applied except as between the real and the personal representatives of the original creator of the option, and I, for one, shall not extend it, because I think that it is limited by the general principle to which I have adverted." Edwards v. West was approved in *Re* Adams and Kensington Vestry,[13] by the Court of Appeal, which took the same view as Fry, J., of Lawes v. Bennett. Under these cases it is plain that, as between the vendor and vendee, the doctrine of conversion does not relate back, and the vendee would not be entitled to the insurance money in the case put.

Moreover, it seems that a vendee has no claim upon the insurance money, even though his contract to purchase was, at the time of the fire loss, a complete and binding contract which a court of equity would specifically enforce. Thus, in Raynor v. Preston,[14] where the vendor, at the date of sale, held a fire policy on the house, which was burned between that time and the time fixed for the completion of the purchase, and the vendor collected the money from the insurance company, it was held by Jessel, M. R., that the purchaser was not entitled, as against the vendor, to the benefit of the insurance, either by way of abatement of purchase money or reinstatement of premises. After expressing an inclination to grant the plaintiff relief, if the case was *res integra*, he said he felt constrained by Lord Eldon's decision, Paine v. Mellen,[15] rendered in 1801, that the buyer of a house does not buy an existing policy of insurance on it, and by the decision of Vice-Chancellor Kindersley in Poole v. Adams,[16] in 1864, that where a house burned after contract to sell it had been made, but before it was completed, the vendor, who collected the insurance without privity of the purchaser and without communicating to the company the fact that a sale had taken place, was entitled to retain the insurance money, and that the purchaser must pay the whole of his purchase money.[17] This decision of the Master

[10] L. R. 7 Ch. Div. 858.
[11] 1 Drew & Sm. 451.
[12] 1 Cox, 167.
[13] L. R. 27 Ch. Div. 394.
[14] L. R. 14 Ch. Div. 297.
[15] 6 Ves. 349.
[16] 33 L. J. Ch. 639.
[17] Citing Bunyan on Fire Insurance, 2d Ed. p. 181.

of the Rolls, was confirmed by the Court of Appeals.[18] Said Cotton, L. J.: "An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a court of equity will give effect to, by transferring the property sold to the purchaser, and so far as he is a trustee, he is so only in respect of the property contracted to be sold. Of this the policy is not a part. A vendor is in no way a trustee for the purchaser of rents accruing before the time fixed for completion, and here the fire occurred and the right to recover the money accrued, before the day fixed for completion. The argument that the money is received in respect of property which is trust property is, in my opinion, fallacious. The money is received by virtue or in respect of the contract of insurance, and though the fact that the insured had parted with all interest in the property insured would be an answer to the claim, on the principle that the contract is one for indemnity only, this is very different from the proposition that the money is received by reason of his legal interest in the property."

Brett, L. J., in concurring, said: "The subject-matter of the contract of insurance is money, and money only. The subject-matter of insurance is a different thing from the subject-matter of the contract of insurance. The subject-matter of insurance may be a house or other premises, in a fire policy, or may be a ship or goods, in a marine policy. These are the subject-matter of insurance, but the subject-matter of the contract is money and money only. The only result of the policy, if an accident which is within the insurance happens, is the payment of money." He further expresses doubts whether the relation between the parties can be properly described by saying that one is trustee for the other, suggesting, that in such case, the rents accruing between the date of the contract and the completion of the sale would belong to the vendee. "But even if the vendor was a trustee for the vendee, it does not seem to me at all to follow, that anything under the contract of insurance would pass. As I have said, the contract of insurance is a mere personal contract for the payment of money. It is not a contract which runs with the land. If it were, there ought to be a decree, that upon the completion of the purchase, the policy be handed over. But that is not the law. The contract of insurance does not run with the land; it is a mere personal contract, and unless it is assigned no suit or action can be maintained upon it except between the original parties to it."

I have quoted thus freely from this case because the doctrine, here promulgated and so ably expressed by the English Chancery Division, has been adopted and recognized in the only cases where the question has arisen in this country.[19]

But two American cases discussing the doctrine of national conversion, as affected by the exercise of an option, have been found. In Kerr v. Day,[20] decided by the Supreme Court of Pennsylvania, the contest was between a tenant in possession with an option to purchase, and a grantee of the lessor. The court held that the possession of the tenant was notice of his equitable rights in the property. and that the grantee having bought the lessor's legal title took subject to the lessee's rights; that the conversion would relate back from the exercise of the option to the original offer.[21] The other case was Lombard v. Chicago Sinai Cong.,[22] decided by the Illinois court. There the vendors had an option, in case their title should be objected to, either to cancel their agreement to convey, or to make their title good, the court held that the loss of the property by fire must fall upon the party who is the owner at the time; that the notional conversion would not relate back from the exercise of the option to the date of the contract to convey, but that until the contract was perfected, by the exercise of the option, the building and contents were the property of the vendor, saying: "Does equity possess, or can we attribute to it, any faculty by which it could forsee how that election would be made?" And holding that, therefore, the vendee was entitled to specific performance of the contract, with compensation for the loss by fire, to be deducted from the purchase money.[23] WILLIAM L. MURFREE, JR.

[18] Raynor v. Preston, L. R. 18 Ch. Div. 1.

[19] May on Insurance (3d Ed.), §§ 450, 456; King v. Preston, 11 La. Ann. 95; 2 Duer on Insurance, p. 53; 1 Phillips on Insurance, §§ 86, 87.

[20] 14 Pa. St. 112.

[21] Citing Lawes v. Bennett, 1 Cox, 167; Townley v. Bedwell, 14 Ves. 591; Daniels v. Davidson, 16 Ves. 253.

[22] 64 Ill. 477; 75 Ill. 271.

[23] See Wells v. Calmar, 107 Mass. 514.

NEGLIGENCE OF CONTRACTORS—MACHINERY —THIRD PARTIES.

ZIEMANN V. KIECKHEFER MANUFACTURING COMPANY.

Supreme Court of Wisconsin, June 20, 1895.

One who puts an elevator in a building, which is being used under his supervision and control, but awaits acceptance till it is found to be in complete running order, is not liable to a servant of the vendee, who, while working not in connection with the elevator, is injured by reason of some defect therein.

This was an action against the Kieckhefer Elevator Manufacturing Company, engaged in the manufacture and sale of passenger and freight elevators, and the Reliance Wire & Iron Works, engaged in the manufacture and sale of architectural wire and iron works in a certain four-story building in Milwaukee, Wis., to recover damages sustained by the plaintiff while engaged in the employ of the latter company as a brass and iron polisher, under the following circumstances: The elevator company had made an agreement with the Reliance Wire & Iron Works to place in its building a first-class freight elevator, with all modern improvements and automatic brakes, all in good and complete running order; and it placed in said building, accordingly, an elevator operated by steam power, for the purposes of conveying freight to and from the various stories and basement of said building; but it was not to be accepted and paid for until in complete running order, and, in case any defects in the work, material, or construction should appear, the elevator company was to promptly make good and repair the same, and that in the meantime, and until approved, the Reliance Wire & Iron Works should hold and operate the elevator for its business, under the supervision and control of the elevator company. While the elevator was so on trial by and in possession of the defendant the Reliance Wire & Iron Works, unaccepted and held for the elevator company, and on December 6, 1892, the plaintiff was engaged in the course of his said employment, in removing machinery from the basement of said building, at a point two or three feet from the elevator shaft, and the elevator was at the fourth floor of the building. One of the employees of the defendant Reliance Wire & Iron Works, who was in one of the stories below the fourth, operated the cable connected with the bolts which caused the elevator to ascend as desired, and the cable which unwinds when the elevator descends became unwound, but the elevator, instead of descending, was held fast in the fourth floor, by reason of the coupling iron on the regulating cable being caught on the frame of the elevator shaft, causing an obstruction to the downward passage of the elevator, and the elevator platform was also too large for the shaft. When the unwinding cable had become almost entirely unwound, the obstruction to the elevator gave way, and it fell down the shaft the entire four stories, to the basement; and by its fall the unwound cable was hurled with great force against and around the plaintiff's right leg; and, the cable immediately slacking up, he was hurled up against the ceiling of the basement between the elevator gearing, when the cable was broken, and the plaintiff dropped senseless to the base of the elevator shaft; and thereupon said elevator fell on him, whereby he sustained the injuires specified. It was alleged that the elevator at the time was not a reasonably safe appliance, and that it was defectively and improperly constructed in certain specified respects, which were the sole cause of the plaintiff's injuries; that they were within the knowledge of the defendants, but unknown to the plaintiff; that his injuries were solely caused by the negligence of the elevator company in improperly constructing said elevator as aforesaid, and in delivering it to and permitting it to be used by the defendant Reliance Wire & Iron Works before it was reasonably safe, and by the Reliance Wire & Iron Works using and operating it while it was not a reasonably safe appliance, and before it had been approved as being in accordance with its agreement with the elevator company. To the plaintiff's complaint containing the foregoing statements and allegations, the defendant the Kieckhefer Elevator Company demurred, on the ground that it did not state facts sufficient to constitute a cause of action; and from an order sustaining such demurrer the plaintiff appealed.

PINNEY, J.: (after stating the facts): 1. By the contract between the elevator company and the Reliance Wire & Iron Works, the elevator was to be held and operated by the latter upon trial, and not to be accepted and paid for until in complete running order, and defects appearing in work, material, or construction were to be made good and repaired by the elevator company. In the meantime, that is to say, while the elevator was on trial, and until the elevator company performed its contract, the Reliance Wire & Iron Works was to hold and operate it for the purposes of its business, under the supervision and control of the elevator company. This supervision and control was for a limited purpose, extended only to such acts as would enable it to perform its part of the contract, and had, we think, nothing to do with the business relations of the Reliance Wire & Iron Works with its servants and employees. The contract and its performance on the part of the elevator company did not create any privity or contract relations between it and the plaintiff, as an employee of the Reliance Wire & Iron Works, who had nothing to do with the operation or use of the elevator, and was not attempting to operate or use it at the time of the accident. It is impossible to say, we think, that the elevator company stood in any relation to the plaintiff by reason of which it owed him any special duty, and equally so to hold that it had invited him, impliedly or otherwise, to approach the elevator, or to come and be at work

near the foot of the elevator shaft, in respect to a matter having no relation whatever to setting up, perfecting, or operating the elevator, while it was on trial. The defendant was acting in the proper conduct of its lawful calling in setting up and putting in proper use one of the machines it had manufactured in the course of its business, and it was under no duty or obligation to furnish a safe place for the servants or employees of the Reliance Wire & Iron Works to work outside of the elevator, or a safe way of passage through the building at or near it. There is no claim that the defendant obstructed the place where the plaintiff or any servants or employees of the Reliance Wire & Iron Works worked, or any way they were accustomed to use in passing into or through the building. The duties devolved on the defendant by its contract related to matters with which it does not appear that the plaintiff had any concern or was in any manner connected. We think the case is clearly distinguishable from Elevator Co. v. Lippert, 11 C. C. A. 521, 63 Fed. Rep. 942; Bennett v. Railroad Co., 102 U. S. 577; Bright v. Barnett & Record Co., 88 Wis. 299, 60 N. W. Rep. 418, and other cases cited by the appellant. There was no privity or contract relation between the plaintiff and defendant, and there was no allurement or implied invitation on the part of the latter to cause the plaintiff to approach or be near the foot of the elevator shaft, or even in the building. If this action could be maintained upon the allegations of negligent and improper construction of the elevator, it would follow that any one actually using it, and receiving injury in consequence,—a much stronger case than the present,—might maintain an action against the manufacturer. This would be to introduce a rule which, we think, is not sustained by authority, and might lead to serious consequences. The case falls, we think, within the rules acted on in Winterbottom v. Wright, 10 Mees. & W. 109; Collis v. Selden, L. R. 3 C. P. 498; and Heaven v. Pender, 11 Q. B. Div. 514. In Collis v. Selden the defendant had negligently and improperly hung a chandelier in a public house, knowing that the plaintiff and others were likely to be therein and under the chandelier, and, unless properly hung, it was likely to fall upon and injure them; and, the plaintiff being lawfully in the public house, the chandelier fell upon and injured him; and it was held that the declaration was bad, in that it did not disclose any duty by the defendant towards the plaintiff for the breach of which an action could be maintained. This case was referred to in Elliott v. Hall, 15 Q. B. Div. 320, and it was said by Grove, J., that "the case was really decided on the ground of uncertainty of the declaration as to the relation between the plaintiff and defendant." And the case of Elliot v. Hall, *supra*, relied on by the plaintiff here, went upon the ground that in that case "a duty arose on the part of the defendant towards the plaintiff," because the defendants, the vendors of coals, forwarded them to the purchasers in trucks, and the goods were necessarily to be unloaded from such trucks by the purchasers' servants; that there was "a duty on the part of the vendors towards those persons who necessarily would have to unload or otherwise deal with the goods to see that the truck or other means of conveyance was in good condition, so as not to be dangerous to such persons." The plaintiff, a servant of the purchasers, was injured by reason of a defective truck in unloading it, and which had been sent by the vendors to the purchasers, loaded with coal. That case is clearly distinguishable from the present one, and falls far short of sustaining it. Here the plaintiff was not riding in or using the elevator, and had in fact nothing whatever to do with it, and there is therefore an entire absence of the duty held to have existed in Elliott v. Hall. The case of Hayes v. Iron Co., 150 Mass. 458, 23 N. E. Rep. 225, is, in substance, the same, and rests upon a duty arising from invitation. The following cases also show, we think, that the action cannot be maintained: Longmeid v. Holliday, 6 Eng. Law & Eq. 562; Losee v. Clute, 51 N. Y. 494; Necker v. Harvey, 49 Mich. 517, 14 N. W. Rep. 503; Loop v. Litchfield, 42 N. Y. 351.

2. It was contended that the defendant was liable as for a breach of duty imposed upon it at common law to avoid acts, the natural and probable consequences of which would be imminently dangerous to the lives or persons of others. Elevators such as this are in such universal use that we cannot say that one placed in position and in use is *per se* a machine, device, or appliance imminently dangerous to the lives of others, or that serious injury to any person using, operating, or approaching, or being near one would be a natural or probable consequence of such use. A steam boiler, by reason of defects in material or workmanship, may explode, causing serious injury or loss of life; but it cannot be maintained that one who had manufactured and sold such boiler, in the absence of actual knowledge of such defects or of fraud, would be liable for the consequences of such explosion. Losee v. Clute, 51 N. Y. 494. And we think the same rule applicable to the present case. There is no claim that the defendant had acted recklessly or in bad faith, or that it had any notice in fact that the elevator was defective, and that the particular injury to the plaintiff or injury to any one would be the natural and probable consequence of its use and operation. The allegations of the complaint are not sufficient to show that there was any breach by the defendant of the common-law duty relied on. For these reasons, we think that the demurrer was properly sustained. The order of the superior court is affirmed.

NOTE.—The basis of liability in cases of negligence is the violation of some legal duty to exercise care, whereby the party, to whom such legal duty is due, has been injured without fault on his part. Cusick v. Adams, 115 N. Y. 55. When a party enters upon the premises of another by invitation, express or implied,

the law imposes the duty on the latter of exercising ordinary care that such person is not injured from the condition of such premises. Emery v. Minneapolis, etc. Exposition, 56 Minn. 460. Such duty does not arise from contract but is imposed by law. No such duty arises in favor of one, who is a mere trespasser on the premises. Crone, etc. Co. v. Lippert, 63 Fed. Rep. 942. Though it is often said, that such duty arises in favor of one who is on the premises as a mere licensee (Emery v. Minneapolis, etc. Exposition, *supra*), yet it is held, that such duty does not exist in favor of a licensee who enters the premises without allurement, enticement or invitation, or where the owner merely passively acquiesces in such entry, as in the case of a fireman, who enters in the discharge of his duty. Crane, etc. Co. v. Lippert, *supra;* Cusick v. Adams, *supra;* Beehler v. Daniels (R. I.), 29 Atl. Rep. 6, 31 Atl. Rep. 562; Woodruff v. Bowen, 136 Ind. 431. So when a party places obstructions in a place, as a passage-way, which other parties have a right to use, he is bound to see that such parties are not injured thereby. Crane, etc. Co. v. Lippert, *supra.*

Independent Contractors.—Often parties employ others to do certain work for them, and in case of negligence by such contractors, questions arise as to the liability of such parties to other persons, who are injured by such negligence. Ordinarily they are liable, unless those doing the work are independent contractors. An independent contractor is defined to be one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work. Powell v. Construction Co., 88 Tenn. 692; Goldman v. Mason, 2 N. Y. S. 337. The employer is still liable: if the injury results directly from the acts the contractor agreed and was authorized to do (Davie v. Levy, 39 La. Ann. 551; Norwalk G. Co. v. Norwalk, 63 Conn. 495; Whitney v. Clifford, 46 Wis. 138; Brennan v. Schreiner, 20 N. Y. S. 130); if the owner interfered with and assumed actual control over the work and the method and means of its performance (Norwalk G. Co. v. Norwalk, *supra;* Faren v. Sellers, 39 La. Ann. 1011; Eby v. Lebanon Co., 166 Pa. St. 632); or if the work contracted to be done is unlawful, or in itself a nuisance, or necessarily attended with danger to others. Powell v. Construction Co., *supra.* Where a party sublet a contract to dig up the streets of a city and to lay pipes, he was held liable to a third party injured by the negligence of the subcontractor, because all parties doing such work were trespassers, unless they had a city license to do it. Colgrove v. Smith, 102 Cal. 220. The fact that the employer appoints a party to watch the work and see that it is done according to contract, does not alter the relations of the parties, but where it was agreed that the work should be done under the directions of a supervising architect, whose decisions on all points were to be final, it was held, that the party doing the work was not an independent contractor. Faren v. Sellers, 39 La. Ann. 1011.

Delivery to Employer or Vendee.—After a contractor or vendor has turned over the property or the articles sold to the owner or vendee, he is not ordinarily liable to a third party for injuries sustained by reason of his negligence, since his duty was only to his employer or vendee. Curtain v. Somerset, 140 Pa. St. 70; Loop v. Litchfield, 42 N. Y. 351; Losee v. Clute, 51 N. Y. 494; Winterbotham v. Wright, 10 Mees. & Wel. 109. If, however, the article sold is imminently dangerous, the vendor will be liable to third parties injured by his negligence, as in the case of drugs wrongly labeled. Thomas v. Winchester, 2 Seld. 397; Loop v. Litchfield, *supra.* So where A having a contract with B furnishes tools or appliances, which he must know B's agent will use in carrying out the contract, a duty is imposed upon him by law to have such articles in reasonably good condition, and he will be liable to any of A's agents, who may be injured by his neglect in that respect. Haven v. Pender, 11 Q. B. D. 503; Elliott v. Hall, 15 Q. B. D. 315; Hays v. Philadelphia, etc. Co., 150 Mass. 457. There can be no question, that when a manufacturer is in possession of and testing his own machinery, he owes to every one who may be in danger from it the duty of proper care, and if he exposes any one to danger from his carelessness in handling or construction, he must answer. This is not a contract duty, but a duty imposed by common law. This rule was applied in a case, where an elevator had been in the possession and use of a vendee for three days, and while it was being tested under the orders of the vendor it fell and injured a servant of the vendee, who was engaged in loading it. Necker v. Harvey, 49 Mich. 517. In the principal case the elevator had not been accepted, and was being used under the control and supervision of the defendant, and the plaintiff was engaged at his work in such place and manner as defendant had reason to expect the vendee's servants to be employed. It does not seem to be a departure from the decisions cited to hold, that the defendant owed the plaintiff a duty to protect him for an injury accruing from its negligence.

JETSAM AND FLOTSAM.

INHERITANCE TAX IN OHIO AND ILLINOIS.

Ohio and Illinois have passed similar acts levying a tax on both direct and collateral bequests and successions. By these acts there is an exemption of $20,000 on direct inheritances, but the exemption applies to what each heir receives instead of to the whole estate of the decedent. On the excess above $20,000 received by father, mother, husband, wife, child or other lineal descendants, brother, sister, or wife or widow of son, or husband of daughter, a tax of one per cent. is to be collected by the State. Thus, an estate of $100,000 divided equally among five children would pay no tax. As to collateral inheritances, the exemption for uncles, aunts, nephews, nieces, or lineal descendants of any of them, is only $2,000, and the tax is two per cent. In all other cases the exemption is to be $500 only, and a graduated rate is imposed on $10,000 and less, 3 per cent.; between $10,000 and $20,000, 4 per cent.; between $20,000 and $50,000, 5 per cent.; over $50,000 6 per cent. Bequests of $19,900 will pay 4 per cent., while bequests of $20,500 would pay 5 per cent. The Illinois law also taxes heavily bequests to charitable and educational purposes. But both States stand in great need of the revenue which was expected from this new source, and their eagerness to raise money seems to have made them too unscrupulous. The Ohio Supreme Court has just decided that the inheritance tax law of that State is unconstitutional, and as the constitutions of the two States are the same on the subject of taxation, it is believed that the Illinois Supreme Court will also decide that the Illinois law is unconstitutional.—*Chicago Legal News.*

HUMORS OF THE LAW.

A literary man stood up in a Chicago police court to answer to a charge of vagrancy.

"I object, your honor," he said with dignity, "to this prosecution of gentlemen who follow the profession of letters, and—"

"I understand," interrupted the magistrate, "that you were found sleeping on a door-step; that you have no visible means of support, and that you have been seen under the influence of liquor."

"What of it?" cried the prisoner. "Though I am as poor as Richard Savage, when he made his bed in the ashes of a glass factory; as drunken as Dick Steele; as ragged as Goldsmith when he was on his fiddling tour, as dirty as Sam Johnson, as—"

"There, there!" cried the magistrate, impatiently. "I have no doubt that your associates are a disreputable lot, and I shall deal with you in such a manner as to cause them to give this town a wide berth. Mr. Clerk, furnish the officer with the names of the vagabonds mentioned by the prisoner."—

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE — Evidence.—On an issue as to whether insured was killed accidentally, he having been shot at the house of G, declarations of G, made on the night insured was shot, that he, G, was going home, and intended to kill insured, if he found him there, were admissible.—STANDARD LIFE & ACCIDENT INS. CO. v. ASKEW, Tex., 32 S. W. Rep. 31.

2. ADMINISTRATION — Executors.—Where money is collected on an insurance benefit certificate by the executrix who is named as beneficiary therein, it is not subject to administration, and the Probate Court has no right to order the executrix to file an inventory of it.—WHITE v. WHITE, Tex., 32 S. W. Rep. 48.

3. APPEAL FROM JOINT JUDGMENT.—The absence of a party to a joint judgment who will necessarily be affected by a reversal thereof defeats the jurisdiction of the appellate court, and prevents the review of the judgment.—NORTON v. WOOD, Kan., 40 Pac. Rep. 911.

4. ATTACHMENT—Levy—Action against Officer.—In an action against an officer for property levied on under an attachment against plaintiff's vendor, an averment by defendant that the sale to plaintiff was made with the design on his part, and on the part of his vendor, to delay and defraud the creditors of the grantor, and to prevent the application of the property to the satisfaction of their demands, does not authorize the admission of evidence of actual fraud.—EATON v. METZ, Cal., 40 Pac. Rep. 947.

5. BANKS — Cashier—Liability on Bond.—The cashier of a bank, whose bond, with sureties, was conditioned that he would "faithfully and honestly discharge his duties as cashier, and account for all such moneys, funds, and valuables" as came into his hands, cashed a draft, payable to his order, amply secured by bills of lading of cotton, and duly forwarded the same, with the bills of lading, to a bank in another city, for collection. The draft and bills of lading were lost in the mail. The cashier's book keeper, whose duty it was to check the statements and accounts with other banks, reported the draft as credited on their account with the bank to which they had been forwarded, and his accounts balanced according to his report. The agent of the railroad company, without production of the bills of lading, and without the consent of the cashier, delivered the cotton to the consignee: Held, that the cashier was not liable on his bond.—FIRST NAT. BANK OF KAUFMAN v. STILL, Tex., 32 S. W. Rep. 61.

6. BONDS — Corporate Bonds—Negotiability.—Bonds issued by a corporation and secured by mortgage are negotiable, though under seal and payable to bearer on a certain day named, or sooner after five years.—AMERICAN NAT. BANK v. AMERICAN WOOD PAPER CO., R. I., 32 Atl. Rep. 305.

7. BOUNDARIES.—Where parties by mutual agreement fix a boundary line, and thereafter acquiesce in the line so established, such line will be considered the true line, though the period of acquiescence be less than that fixed by statute for gaining title by adverse possession.—WHITE v. PEABODY, Mich., 64 N. W. Rep. 41.

8. CARRIERS OF PASSENGERS — Liability—Failure.—A carrier is not liable for failure of a conductor to waken a passenger at a station where she was to change trains, though he had promised to do so.—MISSOURI, K. & T. RY. CO. OF TEXAS v. KENDRICK, Tex., 32 S. W. Rep. 42.

9. CARRIERS OF PASSENGERS—Ejection.—In an action for being wrongfully ejected from a train it was error to charge that plaintiff was entitled to recover for loss of time where no damages in that respect were pleaded.—GULF, C. & S. F. RY. CO. v. SPARGER, Tex., 32 S. W. Rep. 49.

10. CARRIERS — Passenger.—The fact that the conductor may have carried passengers without authority from the company, and contrary to instructions given him, will not relieve the company from liability for the failure to exercise due care towards those so received as passengers, unless they knew they were riding in violation of the rules of the company, and had willfully joined with the conductor in committing a wrong against the company.—CHICAGO, K. & W. R. CO. v. FRAZER, Kan., 40 Pac. Rep. 923.

11. CARRIERS — Passenger — Negligence.—It is negligence on the part of a railroad company for those in charge of a passenger train to induce a passenger to leave the train while in motion, and a gross disregard of the duty it owes to him not to stop the train entirely, and give the passenger ample time and opportunity to alight.—ATCHISON, T. & S. F. R. CO. v. HUGHES, Kan., 40 Pac. Rep. 919.

12. CHATTEL MORTGAGES—Priorities.—The recording of a chattel mortgage does not impart constructive notice to prior mortgagees.—BURNHAM v. CITIZENS' BANK OF EMPORIA, Kan., 40 Pac. Rep. 912.

13. CHATTEL MORTGAGE.—A chattel mortgage filed in the office of register of deeds of the proper county, but not renewed within the year after such filing, as required by the statute, is void as to creditors after the expiration of the year. When possession under such mortgage is relied upon by the mortgagee, he must show an actual and continued change of possession in himself; and possession by the mortgagor, as his agent, is insufficient as against an execution creditor levying thereon.—MOORE v. SHAW, Kan., 40 Pac. Rep. 929.

14. CONSTITUTIONAL LAW—Offenses against Railroad Property.—Sections 1 and 2 of chapter 121, Sess. Laws 1871, entitled "An act to prescribe the punishment for certain offenses against railroad property and in railroad cars and buildings," are in contravention of the second clause of section 16 of article 2 of the constitution, and therefore void.—STATE v. GUINNEY, Kan., 40 Pac. Rep. 926.

15. CONSTITUTIONAL LAW — Insurance Policies. — Act 1883, ch. 107, providing that all insurance companies shall pay losses in full, and prohibiting stipulations to the contrary, does not conflict with Const. U. S. Amend. 14, § 1, providing that no State shall deny to any person within its jurisdiction the equal protection of the laws, as the State may prescribe the terms upon which a foreign insurance company may do business within the State, and the act in question is equally applicable to all insurance companies. — DUGGER v. MECHANICS' & TRADERS' INS. CO. OF NEW ORLEANS, Tenn., 32 S. W. Rep. 5.

16. CONTRACT — Building Contract.—A contract for the construction of a bridge provided for payment on certificate of the engineer that the work had been completed. After the bridge had been practically completed, the contractor demanded payment, and the engineer wrote the owner that the bridge was completed except for some planking which could not be done until low water; that he was willing to accept the bridge as it stood, and advised the owner to retain a certain amount of the contract price to insure the completion of the planking: Held, that the letter entitled the contractor to the payment of the price, less a sufficient amount to insure the completion of the planking.—WASHINGTON BRIDGE CO. v. LAND & RIVER IMP. CO. OF EVERETT, Wash., 40 Pac. Rep. 982.

17. CONTRACT — Law of Place. — Plaintiff, an Ohio corporation, having its principal place of business at A, in that State, made a contract with defendant, a resident of Michigan. The contract was executed by defendant in Michigan, and subsequently countersigned by plaintiff's agent in that State and approved at plaintiff's main office at A, pursuant to a provision, contained in it, that it was "not valid unless countersigned by our manager at L and approved at A:" Held, that the contract was made in Ohio, and was not within the terms of a statute of Michigan relating to contracts made in that State.—AULTMAN, MILLER & CO. v. HOLDER, U. S. C. C. (Mich.), 68 Fed. Rep. 467.

18. CONTRACT—Abandonment—Measure of Damages.—In an action for the breach of a contract to cut logs, on the part of the owner of the timber, the measure of damages is the difference in the cost of cutting the logs and the contract price, the cost being proven by expert testimony, though the cost of the work depends on the management of the work and the season.—GREENWOOD v. DAVIS, Mich., 64 N. W. Rep. 26.

19. CONTRACT—Acceptance of Offer.—Where a series of articles by different authors is offered to a paper for publication for a year at $100 per week, an announcement in the paper that it had engaged certain writers, including many of those in the offer, is at most only evidence of an acceptance of the offer, and does not preclude the paper from showing that there had been no acceptance, or only a modified acceptance.—MCCLURE v. TIMES PUB. CO., Penn., 32 Atl. Rep. 293.

20. CONTRACTS — Assumption of Vendor's Lien.—Defendant agreed to purchase a lot and assume the payment of a lien thereon. The grantor deeded another than the lot purchased, upon which plaintiff held a vendor's lien. The contract was rescinded as soon as the mistake was discovered: Held, that plaintiff could not maintain an action against defendant on such assumption, as there was no privity between the parties, and no consideration passing to defendant from his vendor which would raise an implied promise to assume the discharge of the lien.—HEATH v. CORETH, Tex., 32 S. W. Rep. 56.

21. CONTRACT—Construction.—A contract binds a gas company to furnish to a city "such quantity of gas as may be required by the city council for public lamps at two-thirds of the lowest averaged price at which gas shall or may be furnished to private individuals in the cities of New Orleans, Baltimore, New York, Louisville, and Pittsburgh: Held, that this means the lowest cash price in each city, averaged by adding together such lowest cash prices, and dividing the amount by 5. Two thirds of the quotient will be the price to be paid by the city to the gas company under the contract.—CITY OF CINCINNATI v. CINCINNATI GAS-LIGHT & COKE CO., Ohio, 41 N. E. Rep. 239.

22. CORPORATIONS—Actions against Foreign Corporations.—When the cause of action did not accrue within the State, the statutes of Michigan do not provide for service of process upon foreign corporations.—GRAND TRUNK RY. CO. OF CANADA v. HOSMER, Mich., 64 N. W. Rep. 17.

23. CORPORATIONS—Right to Sue.—Civ. Code, § 299, providing that any corporation holding property in a county shall not maintain an action in relation to such property without filing a copy of its articles of incorporation with the clerk of the county in which such property is situated, does not apply to corporations seeking to acquire property by condemnation.—EMIGRANT DITCH CO. v. WEBBER, Cal., 40 Pac. Rep. 1061.

24. CORPORATIONS—Unlawful Payment by Directors.—Where directors of a corporation wrongfully appropriated money in salaries to themselves, the court may, in an action by the minority stockholders against the majority and the corporation, when the prayer is ample, decree direct payment by the majority stockholders, who were directors, to the minority, of their aliquot share of the amount found due the corporation.—EATON v. ROBINSON, R. I., 32 Atl. Rep. 339.

25. CREDITORS' BILL—Remedy at Law.—A creditor of a corporation, on open account, without a specific lien, filed a bill in equity to collect his debt, which was disputed by the corporation, and asked for the appointment of a receiver, on the ground that the company was hopelessly insolvent, and wasting its assets: Held that, the facts of insolvency and wasting the assets not being sustained by the evidence, the bill should be dismissed.—MARBLE CITY LAND & FURNACE CO. v. GOLDEN, Ala., 17 South. Rep. 935.

26. CRIMINAL LAW — Embezzlement by Municipal Officer.—Pen. Code, § 57, provides that, if any public officer shall misappropriate any money, he shall be deemed guilty of a felony: Held, that an indictment against a county treasurer for misappropriating county funds is good, though it calls the offense larceny.—STATE v. ISENSEE, Wash., 40 Pac. Rep. 985.

27. CRIMINAL LAW—Complaints.—Const. 1875, art. 6, § 28, provides that all prosecutions shall conclude, "against the peace and dignity of the State." Article 1, § 9, provides that in cases of misdemeanors the general assembly may dispense with a grand jury, and authorize such prosecutions before such inferior courts as may be established: Held, in a prosecution for petit larceny before a county judge, that it was not necessary to conclude the complaint with the expression, "against the peace and dignity of the State."—THOMAS v. STATE, Ala., 17 South. Rep. 941.

28. CRIMINAL LAW—Perjury.—On an examination for perjury it appeared that defendant on his *voir dire* as trial juror, stated, when asked if he knew the pro-

prietor of a certain gambling place, that he had nothing to do with "such places;" that at the place referred to gambling prohibited by statute was carried on; that defendant visited places where gambling not prohibited by statute was carried on: Held, that he was not guilty of perjury.—EX PARTE MEYER, Cal., 40 Pac. Rep. 953.

29. CRIMINAL LAW — Witnesses.—Permission to indorse names of additional witnesses on an information, even after the commencement of the trial, being within the sound discretion of the court, a judgment will not be reversed on account of such permission unless the grant of it be an abuse of such discretion.—STATE V. PRICE, Kan., 40 Pac. Rep. 1000.

30. CRIMINAL PRACTICE—Erroneous Sentence.—Where a sentence different from that authorized by law, has been imposed on a defendant convicted of a criminal offense, and, for such error, the judgment is reversed, and the cause remanded to the trial court, with instructions to proceed therein according to law, such trial court resumes jurisdiction of the cause, and has authority to resentence the defendant, and impose the penalty provided by law, notwithstanding part of void sentence has been executed.—UNITED STATES V. HARMAN, U. S. D. C. (Kan.), 68 Fed. Rep. 472.

31. CRIMINAL PROCEDURE — Erroneous Sentence.—A defendant was convicted, under Rev. St. § 4046, of embezzling moneys received by him as assistant postmaster. By consent of the district attorney, in view of the insolvency of the defendant, a verdict was taken upon the issue of embezzlement alone, without any finding of the amount embezzled; and the court sentenced the defendant to imprisonment only, without rendering judgment, by way of fine, for the amount embezzled. For this error the judgment was reversed and the cause remanded for further proceedings according to law: Held, that the trial court was without authority to fix the amount of the fine without the verdict of a jury, and, as the two issues must be tried together, the defendant, having been once in jeopardy on the issue of the amount embezzled, must be discharged.—UNITED STATES V. WOODRUFF, U. S. D. C. (Kan.), 68 Fed. Rep. 536.

32. COURTS—Interpleader—Jurisdiction.—A fund due under an insurance policy by a company was garnished in W county. An assignee afterwards sued the company for the money in another county. The company filed its bill in equity in W county, praying that the claimants be interpleaded and that they be enjoined from prosecuting their several suits: Held, that the suit was properly filed in the court first obtaining jurisdiction.—HOGAN V. DONOVAN, Mich., 64 N. W. Rep. 37.

33. DECEIT—Damages.—Defendant, falsely claiming authority to do so, agreed to sell land to plaintiff at a certain price. Pending the negotiations plaintiff told defendant he intended selling his interest in a fertilizer business to raise money to pay for the land. Plaintiff did not allege that he was obliged to sell his business to raise the money, nor that he intended to go into any other business in the event of his purchase of the land, nor did it appear but his loss would have been the same if he had purchased the land: Held, in an action for damages, that plaintiff cannot recover special damages resulting from the sale of his business.—WEBSTER V. WOOLFORD, Md., 32 Atl. Rep. 319.

34. DEED — Boundaries.—Where a deed described land as bounded by a certain alley, declared such by ordinance, and the grantee and other grantees of lots thereon build their fences on the line thereof, and use it together with the public, the grant is to the middle of the alley, though the city did not work the alley as thus located, and afterwards changed its location.—BLIEM V. DAUBENSPECK, Penn., 32 Atl. Rep. 337.

35. DEED BY MORTGAGOR TO MORTGAGEE.—Where a mortgagor in default executes to the mortgagee an instrument in the form of a warranty deed of the land in consideration of the amount due on the mortgage, with a clause reciting that the deed is given in satisfaction of the mortgage, and that "said grantor shall have the right to redeem or repurchase said premises at any time within one year by paying said sum of $1,175, together with interest until said redemption at the rate of 15 per cent. per annum, and all costs and taxes paid by the grantee, the grantor to have possession for said year," the instrument will be treated as a deed, it appearing that it was given to save the expense and delay of foreclosure, and it not being claimed that the consideration expressed therein was not the full value of the land.—SWARM V. BOGGS, Wash., 40 Pac. Rep. 942.

36. EASEMENTS — Conveyance by Abutting Owner.—Where an abutting owner conveys all his interest in a street, with consent to the grantee to close the street, the latter may close it, as against one thereafter receiving a deed from the grantor of his abutting lots.—COMSTOCK V. SHARP, Mich., 64 N. W. Rep. 22.

37. EJECTMENT—Parties—Rents and Profits.—In ejectment against a tenant in common for an undivided interest, a judgment for plaintiff for rents and profits of the land received by the defendant from the land while unlawfully withheld is proper.—SNELL V. HARRISON, Mo., 32 S. W. Rep. 37.

38. EQUITY — Jurisdiction.—The city of Y advertised for bids for certain bonds about to be issued by it. Complainant submitted the highest bid, and was notified that the same would be accepted. It then asked for information and documents relating to the bonds, in order to submit them to its counsel, and, after receiving an opinion from its counsel that the bonds were invalid, declined to take them, and demanded the return of $3,500, deposited on making its bid. The city refused to return the money, and notified complainant that it would sell the bonds to the highest bidder, and hold complainant liable for any loss. Thereupon complainant filed its bill, praying an adjudication as to the validity of the bonds, a return of the $3,500 if they were found invalid, or the delivery of the bonds on payment of the price if found valid, and an injunction against the city's disposing of the bonds: Held, that equity had jurisdiction of the suit, the remedy at law being inadequate.—GERMAN-AMERICAN INV. CO. OF NEW YORK V. CITY OF YOUNGSTOWN, U. S. C. C. (Ohio), 68 Fed. Rep. 452.

39. ESTOPPEL—Bankruptcy Proceedings—Judgment.—After one D had been adjudged a bankrupt, C, one of his creditors, who had filed a proof of debt founded on promissory notes, obtained leave from the bankruptcy court to sue D in a State court on the notes, and thereafter duly recovered judgment. Subsequently D applied for his discharge, and C, having filed specifications in opposition thereto, moved to dismiss such specifications, and cancel C's proof of debt, on the ground that C had recovered the judgment in the State court, and that the same was in full force. The motion was granted, and C acquiesced in the decision: Held, that D was estopped to set up his discharge in bankruptcy in a suit afterwards brought against him on the judgment.—DAVIS V. CORNWALL, U. S. C. C. of App., 68 Fed. Rep. 522.

40. EVIDENCE OF AGENCY — Declarations.—The acts and declarations of one professing to act as agent of another, unknown to and not ratified by the supposed principal, cannot be received to establish agency, but they are admissible on the questions involved in the controversy after the agency has been established by proof *aliunde*.—LEARNED LETCHER LUMBER CO. V. OHATCHIE LUMBER CO., Ala., 17 South. Rep. 934.

41. EVIDENCE—Lost Letter.—Where a person who received a letter testifies that, after he had read it, he laid it down, and had not seen it since, and that most of his papers had been burned, and that the letter was not in the only place where he kept papers, the loss of the letter is sufficiently shown to admit secondary evidence of its contents, though he further testifies that he had not searched for the letter.—BURT V. LOSS, Mich., 64 N. W. Rep. 60.

42. EVIDENCE — Parol Evidence to Vary Note.—The

terms of a promissory note payable one day after date cannot be so varied as to become due only after the sale of certain lots by evidence of a parol contemporaneous agreement to that effect between the parties.—GETTO v. BINKERT, Kan., 40 Pac. Rep. 925.

43. EXECUTION — Unrecorded Purchase — Notice.—Land in possession of a vendee holding under an unrecorded contract of purchase was levied on under execution against the vendor, who had, prior thereto, assigned his interest in the contract of sale in fraud of his creditors: Held, that the recording of the levy was not constructive notice to the vendee of the claims of the execution plaintiff so as to render payments by the vendee to the assignee of the contract invalid as against the execution plaintiff.—COREY v. SMALLEY, Mich., 64 N. W. Rep. 13.

44. EXECUTION—Restraining Enforcement.—Where a judgment has been fully paid and satisfied, except the cost of suit, and an execution issued thereon for the collection of the original judgment and cost, upon a tender of all the cost and accruing cost the party will be entitled to an injunction to restrain the sheriff from a levy and sale of property under such execution.—WORDEN v. JONES, Kan., 40 Pac. Rep. 1071.

45. FRAUDS, STATUTE OF—Vendor and Purchaser.—Where an agent, who was orally appointed by a married woman with her husband's sanction, purchased land at auction, and the auctioneer made a memorandum in his book of the purchaser's name and terms of sale, the purchase is binding on the woman, as the transaction is not within the statute of frauds.—MOORE v. TAYLOR, Md., 32 Atl. Rep. 320.

46. FRAUDULENT CONVEYANCES—Consideration.—The facts that a mortgagor was insolvent at the time a mortgage was given, that the mortgagor and mortgagee were related, and that the mortgagor made a general assignment the day after the mortgage was executed, will not render the mortgage fraudulent as to creditors, when the claim of the mortgagee was *bona fide*, and the assignment was not contemplated when the mortgage was given, though the mortgagee knew that the mortgagor was in failing circumstances, and an assignment seemed probable.—KALAMAZOO SPRING & AXLE CO. v. WINANS, PRATT & CO., Mich., 64 N. W. Rep. 23.

47. GARNISHMENT — License Fee.—Where a county treasurer receives the license fee of a saloon keeper in installments, contrary to law, after the whole amount of the fee is due, and applies the money as license fees, he cannot be garnished as a debtor of the saloon keeper.—BAY CITY BREWING CO. v. MCDONELL, Mich., 64 N. W. Rep. 12.

48. INJUNCTION—Obstruction of Sidewalk.—An action cannot be maintained, at the suit of a private party, to enjoin an obstruction or other nuisance in a public street or highway, where he has not suffered any special or peculiar damages to himself, his property, or business, but his damages are the same in kind as those sustained by the public in common with himself.—GUNDLACH v. HAMM, Minn., 64 N. W. Rep. 50.

49. INJUNCTION—Action on Bond.—The enforcement of an execution against D was granted, upon the bond of D with sureties. During the pendency of the injunction suit, the court required a new bond in lieu of the old one. Afterwards, a decree was entered disolving the injunction, and rendering judgment in favor of plaintiff against D and the sureties on the first bond for the amount of the judgment: Held, that plaintiff was not estopped by the decree from prosecuting an action against defendant on the second bond, as the statutes do not authorize a judgment against the principal and sureties upon an injunction bond for the amount of the debt enjoined upon the dissolution of an injunction.—APPLETON v. DRAUGHAN, Tex., 32 S. W. Rep. 46.

50. INSOLVENCY PROCEEDINGS—Effect of Appeal.—After a creditor has appealed from the usual order in insolvency proceedings, adjudging a debtor insolvent and staying all proceedings against him, the court cannot modify it by permitting the assignee, who is also a judgment creditor, to levy execution upon certain property of the insolvent.—STATLER v. SUPERIOR COURT OF ALAMEDA COUNTY, Cal., 40 Pac. Rep. 949.

51. INSURANCE.—Where there was no evidence that gaming tables were kept in a building insured as a beer and billiard hall, or that the risk was increased, a charge that plaintiffs could not recover if they knew that the building was used for a different purpose than that named in the policy, thereby increasing the risk, and that fact was unknown to defendant, was not prejudicial to defendant.—GERARD FIRE & MARINE INS. CO. v. FRYMIER, Tex., 32 S. W. Rep. 55.

52. INSURANCE—Proofs of Loss—Waiver.—An insurance adjuster, by telling assured that as to her household furniture everything was satisfactory, but that he wanted to get bills as far as possible of her store goods, and that as soon as she notified him about getting things ready he would meet her, did not waive conditions in the policy requiring assured to make and keep an inventory of her stock, and in case of fire to furnish certain proofs of loss, where, long before the expiration of the time for filing proofs, assured was notified that the company would insist on the performance of the terms of the policy, and she sued on the policy several months before the time for filing the proofs had expired.—ALLEN v. MILWAUKEE MECHANICS' INS. CO., Mich., 64 N. W. Rep. 15.

53. INSURANCE — Appraisement—Condition.—Under a fire policy providing that in case of disagreement as to amount of loss it shall be ascertained by appraisers, and their award shall be *prima facie* evidence of the amount; that loss shall be payable 60 days after notice and proof of loss, including an award by appraisers "when appraisal has been required;" that no action on the policy can be sustained till full compliance by insured with all the foregoing requirements, nor unless commenced within 12 months after loss—an appraisal is a condition precedent to suit only where it has been demanded, and not having been demanded, for eight months, though proofs of loss have been duly made, action may be brought.—NATIONAL HOME BUILDING & LOAN ASS'N v. DWELLING HOUSE INS. CO., Mich., 64 N. W. Rep. 21.

54. INSURANCE — Notice of Cancellation.—Notice of cancellation of a policy sent to the insurance solicitor who procured the policy will not bind the insured when the insured knows that the solicitor was only authorized to procure insurance, and that he has delivered the policy to be insured.—SNEDICOR v. CITIZENS' INS. CO., Mich., 64 N. W. Rep. 35.

55. JUDGMENT—Justice's Judgment.—In an action on a justice's judgment, the failure of the justice's docket to show that he acquired and retained jurisdiction cannot be supplied by memoranda made by him on the file wrapper.—RASCH v. BISSEL, Mich., 64 N. W. Rep. 7.

56. JUSTICE OF THE PEACE—Disqualification.—A justice of the peace who married a first cousin of defendant is incompetent to try the cause, when there are children of the marriage surviving, though the wife be dead.—PEGUES v. BALER, Ala., 17 South. Rep. 943.

57. LANDLORD AND TENANT—Negligence. — Where a landlord retains control of portions of his premises, he is bound, if he puts dangerous machinery thereon, to fence it, or otherwise protect those in its vicinity from injury thereby.—DAVIS v. PACIFIC POWER CO., Cal., 40 Pac. Rep. 950.

58. LIEN—Logging Lien.—In an action by an employee of the holder of a tax title to enforce a logger's lien, the owners of the land may try the question of the validity of the tax title, where the only purpose of the holder thereof in going on the land was to cut the timber.—COOK v. COOK, Mich., 64 N. W. Rep. 12.

59. LIMITATION OF ACTIONS—Absence from State.—Code, art. 57, § 5, providing that if any person liable to an action shall be absent from the State when the cause of action arises he shall have no benefit of the

statute of limitations if the person having the cause of action commences suit after the presence in the State of the person liable within the statutory time, is applicable, though both plaintiff and defendant are non-residents of the State.—MASON V. BALTIMORE & O. R. Co., Md., 32 Atl. Rep. 311.

60. MARRIAGE—Legitimacy—Presumptions.—The husband is presumed to be the father of the child born of the wife during the marriage; and, as separation from bed and board does not dissolve the marriage, it follows that the child to which the mother not divorced gives birth after the separation is within this presumption of paternity the law fixes on the husband.—MCNEELY V. MCNEELY, La., 17 South. Rep. 928.

61. MASTER AND SERVANT—Defective Appliances.—In an action against a railroad company to recover damages for the death of an employee resulting from personal injuries, where the negligence alleged is the furnishing of a defective appliance, in the use of which the employee was injured, it is necessary to allege and prove among other things, that the defendant knew of the defect, or that it was of such a nature or had existed for such a length of time that, in the exercise of ordinary care, it should have been discovered by the defendant, in which case notice ought to be presumed; and, where there is no evidence of such notice or its equivalent, a demurrer to the evidence is properly sustained.—CARRUTHERS V. CHICAGO, R. I. & P. RY. CO., Kan., 40 Pac. Rep. 915.

62. MECHANIC'S LIEN—Filing by Term.—Where the right to file a mechanic's lien existed in a firm composed of three members, the sale to two of them of his general interest in the partnership by the third does not destroy the right of the remaining partners to file it.—SIMONS V. WEBSTER, 40 Pac. Rep. 1056.

63. MECHANIC'S LIEN—State and Federal Jurisdictions.—After a proceeding to foreclose a mechanic's lien is commenced in a State court, the Federal courts have no jurisdiction, in a suit subsequently commenced, to appoint a receiver for the property.—ROGERS & BALDWIN HARDWARE CO. V. CLEVELAND BLDG. CO., Mo., 32 S. W. Rep. 1.

64. MECHANIC'S LIEN — City Building. — The mechanic's lien law is sufficiently comprehensive to authorize a lien in favor of a material-man who furnishes materials for the erection of a public building for a city of the first class. — CITY OF TOPEKA V. THOMAS, Kan., 40 Pac. Rep. 930.

65. MORTGAGE—Future Advances. —Where defendants mortgaged property to secure a past indebtedness and future advances, expecting "the mortgagee to sell them supplies and advances them money," defendants waived their rights to demand money by accepting supplies to the amount agreed to be advanced after money was refused them.—CARRAWAY V. WALLACE, Miss., 17 South. Rep. 930.

66. MORTGAGE —Abandonment of Easement.—Under Code, art. 66, § 11, providing that a mortgage sale, "when confirmed by the court and the purchase money is paid, shall pass all the title which the mortgagor had in the said mortgaged premises at the time of the recording of the mortgage," a mortgagor cannot before default, without the consent of the mortgagee, abandon an easement appurtenant to the mortgaged land, and expressly included in the mortgage, so as to bind a purchaser at a sale under the mortgage, even if the security is not ultimately impaired by the abandonment.—DUVAL V. BECKER, Md., 32 Atl. Rep. 308.

67. MUNICIPAL CORPORATION— Police Regulations.—Regulation of pawnbrokers, junk dealers, and dealers in second hand goods is within the police power.—CITY OF GRAND RAPIDS V. BRAUDY, Mich., 64 N. W. Rep. 29.

68. MUNICIPAL CORPORATION—Injuries to Employee—Liability of City.—In an action against a city by an employee for injuries received while at work in a sewer by its caving in because of defective shoring, it appeared that the city voluntarily assumed the construction of the sewer for the benefit of property abutting on the street, and received annual rentals from the owners, that plaintiff was a common laborer, that after each blast his superiors examined the shoring before allowing the workmen to again enter the trench, that considerable quantities of earth frequently fell, and that plaintiff had had experience in digging sewers: Held, that defendant was liable.—COAN V. CITY OF MARLBOROUGH, Mass., 41 N. E. Rep. 238.

69. NATIONAL BANKS—Insolvency—Dissolution.—The appointment of a receiver for an insolvent national bank, under Act Cong. June 30, 1876, § 1, which authorizes the comptroller, when satisfied of the insolvency of a banking association, to appoint a receiver, "who shall proceed to close up such association, and enforce the personal liability of the shareholders," does not dissolve the corporation.—CHEMICAL NAT. BANK OF CHICAGO V. HARTFORD DEPOSIT CO., Ill., 41 N. E. Rep. 225.

70. NEGOTIABLE INSTRUMENTS — Maturity of Note—Days of Grace.—An action commenced on a note on the last day of grace is prematurely brought.—WIESINGER V. FIRST NAT. BANK OF CITY OF BENTON HARBOR, Mich., 64 N. W. Rep. 59.

71. NEGOTIABLE INSTRUMENTS—Action by Transferer.—Where an action was brought upon a promissory note, and to foreclose a mortgage securing the same, and where it was alleged that the payee of the note duly indorsed the same to the plaintiff, and the copy of the note attached to and filed with the petition showed that there was no indorsement thereon, the unverified denial of the defendant put in issue the title and ownership of the note, and the burden of proof to establish the same rested upon the plaintiff.—FARM LAND MORTGAGE & DEBENTURE CO. V. ELSBREE, Kan., 40 Pac. Rep. 906.

72. NEGOTIABLE INSTRUMENT—Indorsement on Note. —Where defendant, before the delivery of a note given and accepted in payment of another, on which he was liable, wrote his name across the back thereof to become surety thereon, and at maturity indorsed a guaranty of payment, waiving demand and protest, adding after his name, "For thirty days," but it was not agreed or understood by the payee to limit the guaranty to 30 days from maturity, defendant is liable thereon after that time. — SEWARD V. DERICKSON, Wash., 40 Pac. Rep. 939.

73. OFFICERS—Salary—Payment to De Facto Officers. —Where one candidate for city comptroller is given the office by virtue of the decision of the board of canvassers, payment of salary to him prior to a judgment of ouster in favor of the other candidate will bar recovery of salary by the latter for such time as the former occupied the office and received the salary therefor; and it makes no difference that the city had notice of contest, or that members of the city council were *ex officio* members of the canvassing board, there having been no fraud on their part.—SCOTT V. CRUMP, Mich., 64 N. W. Rep. 1.

74. PARTIES—Death of Party—Substitution of Representative.—Under Code, § 142, providing that an action on a cause of action which survives shall not abate by the death of a party, but that, on motion within a year from such death, the court may allow the action to be continued by or against his representative or successor in interest, an action pending against an administrator for an accounting may, on the death of defendant after trial, and before judgment, be continued by a substitution of his representative, and judgment rendered against the substituted defendant without a second trial.—QUICK V. CAMPBELL, S. Car., 22 S. E. Rep. 479.

75. PARTITION—Description of Lands.—A petition for partition described the land as a number of acres in survey 2,625, being all the land in such survey, except 2,025 acres within the limits of the town of B, "and being the farm known as the property of R, deceased," and the decree and orders of sale thereunder con-

tained the same description: Held, that the latter description would control.—GALLOWAY v. HENDERSON, Mo., 32 S. W. Rep. 34.

76. PARTNERSHIP — Authority of Partner—Collection of Claim.—A partnership held a claim against a decedent's estate, which was placed in the hands of one of the partners by the other members of the firm, for collection, with unlimited power as to the mode of collection. This partner was the executor of the decedent's estate: Held, that he was authorized to off-set a personal judgment against himself in favor of the estate against the indebtedness of the estate to the firm. —NUGENT v. ALLEN, Tenn., 32 S. W. Rep. 9.

77. PLEADING—Review on Appeal.—It is error to render a judgment for the plaintiff upon a petition which does not state a cause of action in his favor. The error, being apparent from the record and inherent in the judgment, may be taken advantage of on appeal, without exceptions or motion for new trial in the district court.—OAKLAND HOME INS. CO. v. ALLEN, Kan., 40 Pac. Rep. 928.

78. PRINCIPAL AND SURETY — Fidelity Insurance—Bond.—Bonds of indemnity given by fidelity insurance companies are analogous to ordinary policies of insurance, and are governed by the same principles of interpretation.—MECHANICS' SAVINGS BANK & TRUST CO. v. GUARANTEE CO. OF NORTH AMERICA, U. S. C. C. (Tenn.), 68 Fed. Rep. 459.

79. PRINCIPAL AND AGENT—Wrongful Act of Agent.—Where an employee, without his principal's authority, loans goods in the principal's possession, belonging to another, the principal is not liable for damage to the goods by the borrower.—HART v. MANEY, Wash., 40 Pac. Rep. 987.

80. PROCESS — Service — Officer of Foreign Corporation.—Service of process upon an officer of a foreign corporation casually in the State where the service is made, but where such corporation has no place of business nor agency, is insufficient to confer jurisdiction, though such officer was at the time engaged upon business of the corporation.—UNITED STATES GRAPHITE CO. v. PACIFIC GRAPHITE CO., U. S. C. C. (Mich.), 68 Fed. Rep. 442.

81. PUBLIC LANDS — Homestead Entry — Mistake.—A bill which only avers that complainant supposed that certain land, patented to defendant as a part of his homestead entry, was included within complainant's homestead entry, and that he has made valuable improvements upon it, and thereupon seeks to control the title to such land, without averring that the land was actually included in complainant's entry, or that he made any application to the land department to change his entry so as to include the land, states no cause of action entitling complainant to any relief.—SAVAGE v. WORSHAM, U. S. C. C. (Cal.), 68 Fed. Rep. 521.

82. QUIETING TITLE—Cloud on Title.—A deed or other instrument purporting to convey land that shows upon its face that the grantors therein were out of possession of the land granted at the time of its execution, and that such land at the time was adversely held by another, is void upon its face, as to such adverse occupant, and, as to him, does not create such a cloud upon his title as will authorize the interposition of a court of equity on his behalf for its removal.—REYES v. MIDDLETON, Fla., 17 South. Rep. 937.

83. RAILROAD COMPANIES — Stockholders' Bill for Receiver.—Where a stockholders' bill asks for the appointment of a railroad receiver, not with a view to enforcing any lien or debt, but merely to secure a better management of the property until arrangements can be made for discharging its debts, the mere filing of the bill and service of process do not draw the property of the company into the possession of the court, so as to prevent the company, prior to the appointment of a receiver, from surrendering steel rails lying along its right of way, but not yet attached to its road, to the creditor from whom they were purchased, as part of a larger lot, in partial extinguishment of debt for the purchase price.—ILLINOIS STEEL CO. v. PUTNAM, U. S. C. C. of App., 68 Fed. Rep. 515.

84. RAILROAD COMPANY—Person on Track.—When an engineer sees an adult person walking upon the railroad track in front of a moving train, who appears to have the use of his senses, and not to be under any physical or mental disability, he has a right to presume that the trespasser will heed the warnings given, and will step from the track in time to avoid injury.—CAMPBELL v. KANSAS CITY, FT. S. & M. R. CO., Kan., 40 Pac. Rep. 997.

85. RAILROAD COMPANY — Negligence—Rules of Company.—It is the duty of a railroad company to establish rules reasonably sufficient to protect its employees, but whether or not such rules have been established is a question for the jury.—GULF, C. & S. F. RY. CO. v. FINLEY, Tex., 32 S. W. Rep. 51.

86. RECEIVER—Conversion of Property.—A complaint in an action by a receiver, as such, which alleges that the plaintiff was, on a certain date, by order of court in a certain suit against his insolvent, appointed receiver of the insolvent's property, with the right to take possession of and to sue for and demand the same, sufficiently avers plaintiff's appointment as receiver, and his right to.—DAGGETT v. GRAY, Cal., 40 Pac. Rep. 959.

87. REMOVAL OF CAUSES.—Where, after a petition and bond for removal of a cause from a State court have been filed, but before they have been called to the attention of or passed on by such court, a motion is made therein by the defendant, which is afterwards brought on for hearing in the Federal court, the plaintiff waives any irregularity, by seeking an adjournment of the hearing in the Federal court for his own convenience, without objection on such ground.—KINNE v. LANT, U. S. C. C. (Mich.), 68 Fed. Rep. 436.

88. REPLEVIN — Goods Seized by Sheriff.—Where a sheriff, at the instance of judgment creditors, has seized property under a writ of execution, and placed it in the control of a stranger, an action of replevin will not lie against the judgment creditors.—HOUSE v. TURNER, Mich., 64 N. W. Rep. 20.

89. RES JUDICATA — Void Judgment.—Defendant, as plaintiff in an attachment action, recovered judgment in a justice court of a foreign State. The property attached was sold pursuant to the judgment, and purchased by defendant. Afterwards that judgment was duly declared to be void by the appellate court of said State: Held, in an action by one claiming title to the property sold, that the justice's judgment was not *res adjudicata*.—KOPP v. HUCKINS, Tex., 32 S. W. Rep. 41.

90. SALE—Conditional Sale.—A bill of sale of a stock of goods made to relieve the seller from pressing debts under an agreement that the buyer was to advance, for a large *bonus*, two-thirds the value of the stock, so that the business could be continued under the management of the seller, does not pass the absolute title to the goods.—DUFFIE v. CLARK, Mich., 64 N. W. Rep. 57.

91. SALE—Delivery.—Where a bill of lading was sent to a bank to be delivered to the consignee on payment of the purchase price of the goods consigned, there was no transfer of title until the bill was received by the bank for delivery.—RAMISH v. KIRSCHBRAUN, Cal., 40 Pac. Rep. 1045.

92. SHERIFF—Collection of Note — Coercion.— Defendant, while sheriff, took a note for collection against plaintiff's husband, under an agreement that he was to have one-half for collecting it. He sued out a writ of attachment in the name of the payee, and, under threats of a levy, a mortgage was given by the husband on plaintiff's steers: Held, under How. Ann. St. § 7050, providing that no constable shall buy any note for the purpose of commencing a suit before a justice; section 590, providing that no sheriff shall appear in any court for or on behalf of any party to a suit; and section 596, authorizing sheriffs to exercise all the powers of constables,—that the mortgage was

obtained by fraud and coercion.—VAN DUSEN v. KING, Mich., 64 N. W. Rep. 9.

93. SUBSCRIPTION TO CORPORATE STOCK — Fraud. — One who is induced to subscribe to capital stock by the fraud of the corporation, and within a reasonable time after discovering the fraud repudiates his subscription before the insolvency of the corporation, is not liable thereon.—FEAR v. BARTLETT, Md., 32 Atl. Rep. 322.

94. TRADE-MARK — Unfair Competition— Simulation of Labels.—When a defendant has been enjoined from using a label almost identical with that of complainant, he will also be enjoined from resorting to another label, differing in detail from complainant's, but so like it in general appearance as to deceive consumers, if not trade experts.—CUERVO v. OWL CIGAR CO., U. S. C. C. (N. Y.), 68 Fed. Rep. 541.

95. TRESPASS—Defenses.—Defendant was in possession of land for over 12 years, and held title thereto by tax deed. Plaintiff without defendant's consent or acquiescence, went on, and erected a house. Afterwards defendant peacefully entered, and cut the grass: Held, in an action *quare clausum fregit*, that defendant was entitled to a verdict under a plea of *liberum tenementum*.—VIAL v. HOFEN, Mich., 64 N. W. Rep. 11.

96. TRESPASS—Grading of Street—Damages.—Where a street is graded under void proceedings, the actual damages to such land can be recovered by the abutting owner without regard to the benefit to his land in general by the grading of the street.—FISHER v. NAYSMITH, Mich., 64 N. W. Rep. 19.

97. TRIAL—New Trial—Evidence.—It is the duty of the trial judge, passing upon the motion for a new trial, one of the grounds of which is that the verdict of the jury is not sustained by sufficient evidence, to review the evidence in the case, and to approve or disapprove the verdict; and if, after such review of the evidence, he is clearly of the opinion that the verdict is wrong, he should express his disapproval by setting it aside, and granting a new trial.—CHICAGO, R. I. & P. RY. CO. v. REARDON, Kan., 40 Pac. Rep. 931.

98. TRIAL—Hearing. —Where a law case, heard by the court alone, was remanded by the Supreme Court for the determining of an issue upon which there was evidence at the former hearing, but which was not passed upon by the court, it was not error for the trial court to consider that question alone and deny a trial *de novo*.—C. AULTMAN & CO. v. SALINAS, S. Car., 22 S. E. Rep. 465.

99. TRUST—Charitable Bequest—Validity.—A conveyance of property to a religious corporation, in trust to invest the rents thereof to form a permanent fund, and to pay one-half the income thereof to the grantor, or any heir of the grantor of the same name who may demand the same, and, in case no demand therefor is made, to invest said income so as to increase and accumulate the fund, and providing that the remaining half of said income should be either invested in order to increase and accumulate the fund or expended on charitable objects, is, as to one-half the fund, a valid charitable trust, subject to an illegal discretion as to the accumulation for the benefit of the grantor or his descendants, which will be rejected; as to the other half, an invalid trust was created, the beneficial interest therein resulting to the owner.—WARDENS, ETC., OF ST. PAUL'S CHURCH v. ATTORNEY GENERAL, Mass., 41 N. E. Rep. 231.

100. TRUSTS—Payments by Trustee.—Defendant gave deceased a note, for money which he owed her, by which he promised to pay $400 for her funeral expenses or to return it to her on demand. During her last sickness, deceased handed the note to defendant, saying, "Here is something for you:" Held, that an express trust, to expend the money, after her death, for her funeral expenses, was created.—BEDELL v. SCOGGINS, Cal., 40 Pac. Rep. 954.

101. TRUST AND TRUSTEE— Accounting—Maintenance of Minor.—Where a widow has taken in charge the persons and estates of the minor children, though not appointed legal guardian till several years thereafter, she will, on an accounting, be credited with money paid for the maintenance of the minors, and expenditures incurred in good faith in improvements on their property, during the time there were no letters of guardianship on their estate.—IN RE BEISEL'S ESTATE, Cal., 40 Pac. Rep. 961.

102. VENDOR AND PURCHASER — Contract. — Where land was conveyed to a corporation, to be paid for in stock, and no day was fixed for the delivery of the stock, the corporation cannot be put in default until demand for the stock is made.—GREENBERG v. CALIFORNIA BITUMINOUS ROCK CO., Cal., 40 Pac. Rep. 1053.

103. VENDOR'S LIEN—Waiver.—Plaintiff conveyed all his property to his son, the consideration named being $950. It was agreed that the deed should not be operative until the manner and time of payment should be agreed on. Plaintiff remained in possession until it was rendered to the son under an agreement to pay plaintiff during life a certain sum per month if the son occupied the premises personally, or receive rents from them: Held that, if plaintiff had a vendor's lien at the time of the last agreement, he then and thereby lost it.—GARD v. GARD, Cal., 40 Pac. Rep. 1059.

104. WATERS—Appropriation—Abandonment.—Where a party appropriated water, and by failure to apply it to beneficial use within a reasonable time forfeited his rights, he may afterwards re-enter if intervening rights have not attached. — BEAVER BROOK RESERVOIR & CANAL CO. v. ST. VRAIN RESERVOIR & FISH CO., Colo., 40 Pac. Rep. 1066.

105. WATERS—Rights.—When, under the acts of 1879 and 1881, providing for settling priorities to the use of water for irrigation, a certain quantity of water has been decreed to plaintiff, he cannot, by making a beneficial use of a portion of it, assert against subsequent appropriators, a claim to the excess over that used by him, when for 18 years after the original diversion by him, and for more than 9 years after his rights were established by the decree, he did not make any use of the excess.—NEW MERCER DITCH CO. v. ARMSTRONG, Colo., 40 Pac. Rep. 989.

106. WILL—Description of Property.—Testator's will provided that: "Whereas, I have this day made a deed conveying to J the farm whereon I now reside, I do bequeath to the said J all my personal property. I thus give to the said J all my property and estate because he is married to my niece and desire that they shall enjoy the same to the exclusion of my relatives." The deed was set aside as procured by undue influence: Held, that the farm did not pass to J under the will.—ZIMMERMAN v. HAFER, Md., 32 Atl. Rep. 316.

107. WILL—Estates Tail—Barring Remainder.—A testator devised land to E, "to have and to hold the same to the said E and the heirs of her body, provided, however, that the children of the said E do not marry or be given in marriage to any of the children of my uncle J, or to any of his grandchildren, or great-grandchildren, or other lineal descendants of the said J; but should any of the children of the said E marry any of the descendants of the said J, the share of my estate of he, she, or they so marrying as aforesaid shall go to and become vested in [the other child or children of the said E, share and share alike;" and the testator charged E with the payment of a legacy of $2,000: Held that E took an estate tail, which became converted into a fee simple absolute by her deed executed agreeably to the Pennsylvania statute for the barring of estates tail.—PEARSOL v. MAXWELL, U. S. C. C. (Penn.), 68 Fed. Rep. 513.

108. WILL—Revocation.—Code Civ. Proc. § 1328, provides that upon filing a petition for the revocation of probate of a will "a citation shall be issued to the executors, etc.: Held, that such citation cannot be issued after the petition has been filed for over a year, though a prior citation had been issued, but was quashed for irregularity.—BACIGALUPO v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT NO. 10, Cal., 40 Pac. Rep. 1055.